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SEIU, UNITED HEALTHCARE WORKERS-WEST

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CITY OF HOPE MEDICAL CENTER,

Employer/Petitioner,

and

UNITED STEEL WORKERS,

Union.

and

SEIU, UNITED HEALTHCARE WORKERS-
WEST,

Intervenor.

No. 21-UC-249611

**REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S
CORRECTED DECISION AND ORDER
CLARIFYING UNIT**

Hearing officer: Stephen W. Simmons

I. GROUNDS FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Intervenor Service Employees International Union, United Healthcare Workers-West (“UHW”), submits this Request for Review of the Regional Director’s January 15, 2020 “Corrected Decision and Order Clarifying Unit” (“Decision”). The Decision at issue clarified United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL-CIO/CLC (“USW”) as the proper representative of a bargaining unit made up of approximately 100 Food and Nutrition Service (“FANS”) employees at City of Hope National Medical Center (“City of Hope” or “COH”), an acute care hospital located in Duarte, California.

As demonstrated below, compelling reasons exist for the Board to grant review. First, the Regional Director’s decision on a substantial factual issue — specifically, whether or not the currently existing UHW bargaining unit at City of Hope is a “non-conforming” unit — is clearly erroneous on the record. This error prejudiced UHW because, according to the Regional Director, the existence of this “non-conforming” unit justified the creation of an additional non-conforming unit made up of only the FANS workers when such a unit would otherwise violate the Board’s Health Care Rule. And second, irrespective of whether the existing UHW bargaining unit conforms to Board rules, the Regional Director departed from Board precedent in deciding that USW should be permitted to represent a nonconforming FANS-only unit.

II. STATEMENT OF FACTS

A. STIPULATED FACTS

During the aforementioned hearing, the parties stipulated to an extensive set of facts. This stipulation was memorialized at NLRB Exhibit 2 (“B. Ex. 2”), and is set forth below with minor, non-substantive revisions.

1. For purposes of this matter, City of Hope National Medical Center qualifies as an acute care hospital as defined in the NLRB’s Health Care Rules, codified at 29

CFR § 103.30(f) (“Appropriate Bargaining Units in the Health Care Industry”); and COH is an employer within the meaning of Section 2(2), and is engaged in commerce as defined by Section 2(6) and (7) of the National Labor Relations Act (“the Act”).

2. SEIU-UHW is a labor organization within the meaning of Section 2(5) of the Act.
3. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“USW”) is a labor organization within the meaning of Section 2(5) of the Act.
4. UHW and USW each claim to represent the food service employees at issue in this matter. Those employees are employed by COH in the following classifications:
 - a. Barista I;
 - b. Catering Service Worker;
 - c. Chef de Cuisine;
 - d. Cook – Grill;
 - e. Cook I;
 - f. Cook II;
 - g. Food Service Worker II;
 - h. Food Service Worker I;
 - i. Lead Barista;
 - j. Lead Worker – Food;
 - k. Program Specialist – Food Services;
 - l. Project Coordinator – Food Services;
 - m. Room Service Operator; and
 - n. Sous Chef.
5. COH has not recognized either UHW or USW as the food service employees’ representative.
6. Several years ago, COH directly employed food service employees to work in, among other places, restaurants open to patients, visitors, and employees. Some

of these food service employees also delivered food to patient rooms and interacted with catering services.

7. COH contracted with Sodexo to perform food service work at the Medical Center sometime in 1999 or 2000.
8. USW petitioned to represent the food service workers at COH (aka Food and Nutrition Service, or “FANS”) on August 13, 2004 in case number 21-RC-20766. This petition included both the FANS employees and the environmental service employees (aka “EVS” employees) at COH Medical Center because, at the time, Sodexo employed both the FANS and EVS employees. USW was certified by the NLRB as the exclusive bargaining representative of FANS and EVS employees on September 24, 2004.
9. USW’s collective bargaining relationship with Sodexo was marked by successive collective bargaining agreements, the most recent of which was effective by its terms from December 14, 2018 – December 15, 2021.
10. In 2015, Sodexo lost its contract with COH for the EVS work and COH awarded the EVS work to another contractor called Xanitos. USW continued to represent the COH EVS employees after Xanitos began employing the EVS employees. USW continues to represent the COH EVS employees employed by Xanitos. The most recent USW-Xanitos contract covering the EVS workers is effective from December 14, 2018 to December 15, 2021.
11. In July 2019, COH announced its intention to cancel its contract with Sodexo and take the food service work back in-house.
12. On July 31, 2019 UHW demanded that COH recognize that union as the employees’ bargaining representative, and add those employees to the existing UHW bargaining unit. COH did not immediately respond.
13. Food service employees are covered by the “Cafeteria” cost center as part of COH’s Enterprise Support Services Department.
14. By email on August 15, 2019, by its representative Dianne Kanish, USW lodged its claim to represent the food service employees.
15. In response to UHW’s demand for recognition, and USW’s claim that it was the food service employees’ bargaining representative, COH wrote representatives for both unions. Those communications advised both unions that their competing claims presented a question concerning representation that COH was uncomfortable, unqualified, and unwilling to answer. Instead, COH asked the

parties to work out the representation issues themselves; as an alternative, COH stated it would take the matter to the NLRB if the parties could not resolve the issue.

16. USW responded through its counsel by email on September 12, 2019. In that message, USW's attorney set forth that union's arguments for why COH must recognize and bargain with USW, and why UHW's claim to represent the employees should fail as a matter of fact and law.
17. With no resolution by late September, COH reached out to the unions again to see if their respective positions had changed. Both UHW and USW made it clear they had not abandoned their claim to represent the food service employees.
18. On or about September 27, USW filed an unfair labor practice charge against COH, alleging that COH has unlawfully failed and refused to recognize and bargain with that union as the food service employees' exclusive collective bargaining representative.
19. On or about October 16, UHW moved to arbitration its grievance over COH's failure to recognize that union as the food service employees' representative.

B. ADDITIONAL FACTS

Additional relevant facts were omitted from the stipulation. UHW currently represents a bargaining unit at COH made up of over 900 technical and non-professional employees (the "Service Unit"). (See USW Exhibit 29 ["U. Ex. 29"], at p. 47 [list of job classifications].) Historically, COH maintained its own food service operation and employed full-time food service workers. Silvia Galarza, a former COH food service worker who is now a manager in the FANS department, testified that when she started at COH in 1996, food service workers were represented by a local union affiliated with SEIU.¹ (See Hearing Transcript ["Tr."] at p. 37, line 15 [37:15].) The only SEIU local at COH during this time period was UHW's predecessor, SEIU Local 399, which previously represented the Service Unit. Thus, at the very least, the FANS employees were members of the Service Unit during the period between Ms. Galarza's hiring in 1996 and COH's contracting with Sodexo in 1999 or 2000.

¹ SEIU Local 399 merged with Northern California-based SEIU Local 250 to form UHW in 2005.

After COH canceled its contract with Sodexo in 2019, COH management offered the former Sodexo food service workers a “first right of refusal” for newly created FANS positions. Aside from this “first right of refusal,” the former Sodexo workers participated in a standard hiring process: they submitted online applications, and underwent drug testing and background checks. (U. Ex. 19 at ¶ 4, 7; Tr. 114:4-115:2.) Ultimately, COH hired approximately 90 former Sodexo food service employees to work in its new FANS department. (Tr. 157:17.) Though these employees are paid the same base wage rate they earned with Sodexo, their retirement and health care benefits changed. (Tr. 116:14-18.) FANS employees now receive the same retirement and health care benefits as other COH employees, including members of the UHW Service Unit. (U. Ex. 20.) COH is currently in the process of filling out the FANS department, with the aim of hiring 114 total employees. (Tr. 69:17.) This process includes advertising open FANS positions on COH’s public website. (Intervenor’s Exhibit 1-2 [“Int. Ex. 1-2”].)

III. PROCEDURAL HISTORY

On July 31, 2019, UHW demanded that City of Hope recognize UHW as the FANS employees bargaining representative and add those employees to the existing UHW bargaining unit. USW made a similar demand on August 15, 2019. City of Hope presented UHW and USW’s claims to one another and sought informal resolution, but neither union was willing to cede their claim. On September 27, 2019, USW filed an unfair labor practice charge against City of Hope, alleging that City of Hope had unlawfully failed and refused to recognize and bargain with USW as the FANS workers’ exclusive collective-bargaining representative.

The petition in this matter was filed by USW on October 4, 2019, for the purpose of clarifying which union, USW or SEIU-UHW, was the proper representative of the FANS workers at City of Hope. On November 18 and 20, 2019, representatives of both unions, as well as City of Hope, participated in a hearing before Field Attorney Stephen A. Simmons at the offices of Region 21 of the NLRB, in Los Angeles, California. The Regional Director issued a decision on January 15, 2020, clarifying USW as the proper representative of the FANS

employees. On the same day, the Regional Director issued a corrected Decision for the purpose of revising USW's full name.²

IV. LEGAL ARGUMENT

A. THE BOARD SHOULD GRANT REVIEW BECAUSE THE REGIONAL DIRECTOR DECIDED, WITHOUT SUFFICIENT EVIDENCE, THAT THE UHW BARGAINING UNIT AT CITY OF HOPE IS A "NON-CONFORMING" UNIT.

The Board uses "industry-specific guidelines" to evaluate the appropriateness of a proposed bargaining unit. *See The Boeing Company* ("Boeing"), 368 NLRB No. 67, slip op. at 6 (2019). In an acute health care facility, there are only eight (8) appropriate units:

(1) All registered nurses; (2) All physicians; (3) All professionals except for registered nurses and physicians; (4) All technical employees; (5) All skilled maintenance employees; (6) All business office clerical employees; (7) All guards; and (8) All other nonprofessional employees.³

"Various combinations of units" may also be appropriate under the Health Care Rule. *See Dominican Santa Cruz Hospital*, 307 NLRB 506, 507–08 (1992); *see also Kindred Hosp. Baldwin Park*, 2017 NLRB Reg. Dir. Dec. LEXIS 85, at *5, 14 (finding a unit made up of "all ... technical employees and all other nonprofessional employees" to be appropriate); *MHM Servs., Inc.*, 2007 NLRB Reg. Dir. Dec. LEXIS 26, at *19 (Mar. 2, 2007) (similar finding).

Here, the Regional Director determined that the existing UHW Service Unit, which is and has always been a proper combined unit comprised of all City of Hope employees in the "technical" and "non-professional" categories, is "non-conforming" under the Health Care Rule. (Decision at p. 6-7.) According to the Region, "from the evidence collected regarding UHW's currently recognized bargaining unit ... it does not include all of City of Hope's employees in any Rule category." (Decision at p. 6.) This is both (1) inaccurate and (2) a flawed recitation of

² For reasons unknown to UHW, USW refuses to identify itself by the name of the local union actually seeking to represent the FANS employees. Thus, in the corrected decision, the Region struck "Local 675" from USW's full international name. This obfuscation on the part of USW, which has still yet to be explained, caused numerous problems for UHW and its counsel in its efforts to prepare for these proceedings.

³ Final Rule on Collective Bargaining in the Health Care Industry ("Health Care Rule") 29 CFR § 103, *aff'd American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991).

the Board's long-held standard for determining the proper composition of bargaining units in the Health Care industry. Because the Regional Director then relied on this finding, which lacks factual and legal support, as justification to ignore the Health Care Rule and establish a non-conforming FANS-only unit, UHW requests review.

The Region's conclusion that the UHW Service Unit "does not include all of City of Hope's employees in any Rule category" is not supported in the factual record. At the Hearing, USW identified four non-represented COH job classifications in support of its claim that the Service Unit does not conform to the Health Care Rule. (See U. Ex. 14–17 [Lobby Ambassador/Health Care; Telerecruiter; Patient Access Representative III; Nuclear Med Technologist].) According to USW, these classifications belonged in the UHW Service Unit because they fall under the "technical" and or "all other nonprofessional employees" categories, and their absence made the Service Unit nonconforming. This was incorrect then, and remains incorrect now. Other than offering online job postings for these classifications, USW failed to make any further arguments or introduce any additional evidence showing exactly why, at this specific employer, the four classifications should be categorized as "technical" or "nonprofessional." Nor did USW explain whether these are older or newly established positions, or even how many employees work in these classifications. Without concrete answers to these questions, USW cannot prove that the classifications even belong in the Service Unit in the first place, let alone that their omission makes the unit nonconforming. The Region should have recognized these deficiencies in USW's argument, instead of adopting the argument without further analysis.

Even ignoring these issues, the Region's finding still departs from Board precedent. It is well-settled that a while a bargaining unit must be "appropriate," it need not be "the most appropriate unit."⁴ See, e.g., *Professional Janitorial Service of Houston, Inc.*, 353 NLRB No. 65 (2009); *Sunrise Nursing Home*, 325 NLRB 380, 381 (1998); *Hartford Hospital*, 318 NLRB 183, 191 (1995). *Specialty Hospital of Washington-Hadley, LLC* ("Specialty Hospital"), 357 NLRB

⁴ See *Dominican Santa Cruz Hosp.*, 307 NLRB 506, 508 (1992) (holding that "[i]n promulgating its Health Care Rule, the Board has not significantly changed or modified [this] proposition, either generally or specifically, for the health care industry, but rather has reaffirmed it").

814 (2011) provides a useful example of this principle. There, an employer argued that a proposed technical unit was inappropriate because, among other reasons, it omitted four “recreation technicians.” 357 NLRB at 837. The Board declined to classify the unit as non-conforming on this basis. *See id.* (“I do not find the exclusion of four employees from bargaining unit of 148 employees ... renders that unit as inappropriate.”). Thus, in the context of an acute care hospital, a combined technical/nonprofessional unit is “appropriate,” even minus a handful of otherwise eligible employees. Applying this principle here, USW’s contention — and the Region’s eventual finding — that the missing four classifications make the Service Unit non-conforming is without merit. If four employees out of a 148-person unit did not prove meaningful in *Specialty Hospital*, four missing positions in the context of a 900-person bargaining unit made up of at least 75 job classifications is similarly irrelevant here.

Referring to the Service Unit, the Regional Director notes that “UHW’s recognition is restricted to specific job classifications, rather than Rule unit categories.” (Decision at p. 6.) Thus, “[t]he failure to adopt whole standardized bargaining units for an acute care hospital, as is the case for UHW, leads the Region to find the existing unit nonconforming.” (*Ibid.*) This conclusion, which the Region directly relies to establish a non-conforming FANS-only unit, finds no support in available Board precedent, and seems to be invented from whole cloth. In its analysis of the Health Care Rule, the Board has never required that a union contract formally identify the category of employee included in a bargaining unit for that unit to comply with the Rule. What matters is that the Unit is “appropriate” — i.e., that it includes most or all of the employer’s employees in a given category (or categories). Whether the category is named, or whether, as here, the employees’ classifications are simply listed, is immaterial.

B. THE BOARD SHOULD GRANT REVIEW BECAUSE USW DID NOT MAKE A SUFFICIENT SHOWING OF “EXTRAORDINARY CIRCUMSTANCES” TO JUSTIFY THE CREATION OF A NONCONFORMING UNIT

Due to the unique nature of the acute care industry, a party petitioning for a nonconforming unit is must show “extraordinary circumstances.” *See, e.g., Kaiser Foundation Hospitals*, 312 NLRB 933, 934 (1993); *St. Margaret Memorial Hospital*, 303 NLRB 923, 924

(1991). “Extraordinary circumstances exist only where a hospital is ... uniquely situated such that application of the [Health Care] Rule would be unjust or an abuse of discretion.” *St.*

Margaret Memorial Hospital, 303 NLRB at 924. According to the Board,

[t]he party urging extraordinary circumstances bears a heavy burden to demonstrate that ... there are such unusual and unforeseen deviations from the range of circumstances already considered that it would be unjust or an abuse of discretion for the Board to apply the Rule. *Virtua Health, Inc.*, 344 NLRB 604, 609 (2005).

In *Child’s Hospital*, for example, the Board found the merger of an acute care facility and a non-acute facility into the same physical building to be a sufficiently extraordinary circumstance. *See Child’s Hospital*, 307 NLRB 90, 92 (1992). By contrast, in *Dominican Santa Cruz Hosp.*, the Board held that the existence of two separate unions competing to represent the same group of employees is not such a circumstance. *See* 307 NLRB at 507-08 (“Finally, I am not persuaded ... that having two unions petition for ‘competing, appropriate’ units is so unique or extraordinary as to require special or preferential treatment being given to these two cases.”)

Here, it is undisputed that USW is petitioning to represent a nonconforming unit. An FANS-only unit would not comply with the Health Care Rule, as there is no designated carve-out for food service workers. Instead, because the FANS employees are not nurses, physicians, professionals, technical employees, skilled maintenance workers, business clericals or guards, they fall under Category 8: “all other nonprofessional workers.” *See, e.g., Rhode Island Hospital*, 313 NLRB 344, 344 (1993) (“Nonprofessional unit ... included: ... (DIET): Baker, Cafeteria Cashier, Food Service Worker - Utility, Food Service Worker Cafeteria, Food Service Worker - Tray Assembly, Cooking Assistant, Cook I and II.”); *Rush University Medical Center*, Case 13-CA-152806, 2015 NLRB LEXIS 596 at *5 (Aug. 7, 2015) (“The existing unit of nonprofessional employees that the Union currently represents ... Included: ... food service assistant I lead, food service assistant II lead.”). The Board has consistently identified cooks and other food service workers as belonging in an acute care hospital’s Category 8 “nonprofessional”

unit. Therefore, because USW was advocating that the Region ignore the Health Care Rule and create an FANS-only unit, the “extraordinary circumstances” should have applied here.

The Region gives several justifications for its decision to ignore the Health Care Rule and establish a nonconforming FANS-only bargaining unit. First, according to the Region, the existing UHW Service Unit is also nonconforming. As discussed above, this finding is inconsistent with the factual record. Moreover, even in the case of a previously existing nonconforming unit, the Board will find appropriate “only units which comport, insofar as practicable, with the eight appropriate units or appropriate combinations thereof.” See NLRB G.C. Memo 91-3, “Health Care Unit Placement Issues,” at p. 4 (June 5, 1991).⁵ The Region makes no effort to reconcile its decision with this principle. Next, the Regional Director points out that the FANS workers initially chose USW as their representative 15 years ago, and “the Board is reluctant to deprive employees of their chosen bargaining representative.” (Decision at p. 7.) While this is true, no Board precedent would support the proposition that USW’s status as the FANS workers’ representative during the Sodexo period rises to the level of an “extraordinary circumstance” that would justify ignoring the Rule. Indeed, the facts here mirror those of *Dominican Santa Cruz Hosp.*, cited above, not *Child’s Hospital*.

The Region’s finding on this issue also ignores necessary context. The FANS workers initially voted to join the UHW Service Unit, sometime prior to 1996, but left the unit when their department was contracted out to Sodexo. Because Sodexo is a food service company, and the UHW Service Unit is a one-hospital bargaining unit within a health care union, it would have been inappropriate for the FANS workers to remain in the Service Unit — which had previously been their first choice — during the Sodexo period. Now that the FANS workers’ employment status at City of Hope has been restored, however, they should at the very least be given the *option* of returning to UHW, their pre-2000 chosen representative.

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⁵ The same memo notes that the “extraordinary circumstances” provision, referenced above, is to be “narrowly construed.” (NLRB G.C. Memo 91-3, *supra*.)


V. CONCLUSION

The Region's decision to ignore the Health Care Rule and create a non-conforming bargaining unit of food service workers, where none existed before, is in error. The existing UHW Service Unit at City of Hope conforms to the Rule as a combined "technical" and "non-professional unit," and the Region's decision otherwise constituted clear error based on the facts. Moreover, the Region departs from Board precedent in finding that sufficiently "extraordinary" circumstances exist here to create the non-conforming food service unit. On these grounds, UHW requests review of the Regional Director's Decision.

Dated: February 10, 2020

WEINBERG, ROGER & ROSENFELD
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**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 10, 2020, I served the following documents in the manner described below:

**REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S CORRECTED
DECISION AND ORDER CLARIFYING UNIT**


- ☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- ☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from mpiro@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 10, 2020, at Alameda, California.


Rhonda Fortier-Bourne

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